

Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?

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- I. INTRODUCTION
- II. LEGAL DEVELOPMENTS
 - A. *Evolving Principles*
 - B. *Arbitration of Public Law Rights Under Collective Bargaining Agreements*
- III. EVALUATIONS AND RECOMMENDATIONS
 - A. *Pros and Cons of Mandatory Arbitration of Public Law Claims*
 - B. *Due Process*
- IV. THE PRACTITIONERS SPEAK
 - A. *Background*
 - B. *Management Lawyers' Views*
 - C. *Views of Union/Employee Lawyers*
- V. CONCLUSION

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I. INTRODUCTION

In the famous *Steelworkers Trilogy*¹ of 1960, the U.S. Supreme Court gave a ringing endorsement to the labor arbitration process. That included both judicial enforcement of a union–employer agreement to arbitrate and judicial enforcement of an arbitrator’s award. Doubts about coverage of an arbitration provision were to be resolved in favor of arbitration. In dealing with an arbitral award, courts were confined to matters of due process and the legality of the award and were not to review the merits of the arbitrator’s interpretive decision. Despite that sweeping triumph, in 1976 the lead union lawyer in the *Steelworkers Trilogy*, by then Berkeley Law Professor David Feller, was lamenting what he described as the “coming end of arbitration’s golden age.”² Feller’s concern was that the increasing role of statutory law in labor relations would displace the former autonomy of the “system of industrial self-governance” constructed by employers and unions through collective bargaining.³ Feller may have been overly pessimistic, but legislative developments have certainly moved in that direction.⁴

Feller was quite explicit in his 1976 presentation that he was not referring to a decline in the use of labor arbitration, but rather to a diminution in the independence of arbitrators in dealing with labor-management disputes.⁵ Yet,

¹ *United Steelworkers of Am. v. American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In arbitration, disputing parties agree to have a neutral third party resolve the issue by a final and binding decision. The first two *Trilogy* cases dealt with enforcement of agreements to arbitrate. *Enterprise Wheel* dealt with review of an arbitral award. Refinements on enforcing arbitration agreements came in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986). Strict limits on overturning awards as contravening supposed public policy were imposed in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 42–43 (1987); *E. Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57, 62–67 (2000).

² David E. Feller, *The Coming End of Arbitration’s Golden Age*, in 29 ARBITRATION—1976, PROCEEDINGS OF THE TWENTY-NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 97 (Barbara D. Dennis & Gerald G. Somers eds., 1977).

³ *Id.* at 107.

⁴ There would seem to be no need for citing the broad array of federal and state laws enacted since the 1960s prohibiting employment discrimination, protecting employee safety, health and retirement benefits, requiring advance notice of plant closings, and so on. However, for a general overview see Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495 (2004).

⁵ Feller, *supra* note 2, at 97. Feller went so far as to insist that in the golden age, labor arbitrators were not even engaged in contract interpretation in the usual sense. In a discharge case, for example, he declared that the principal issue is not whether there was a

LABOR AND EMPLOYMENT ARBITRATION TODAY

in fact, the decline in union density since the 1970s, especially in private employment, has been dramatic. Union membership was 25.7% of the U.S. workforce in 1970; it is 11.1% today.⁶ Because of the continuing growth of the labor force, the drop in union membership was less precipitous, but it went from 21.2 million in 1970 to 14.8 million in 2015.⁷ In the mid-1970s, when Professor Feller spoke, the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) reported an annual total of 8,268 arbitration awards issued under their auspices.⁸ After rising substantially during the 1980s and 1990s, the figure fell to about 3,850 by 2014.⁹ After its “golden age,” labor arbitration seems to have been tarnished not only in the autonomy of the process but also in sheer numbers.

The major developments in employer-employee arbitration currently do not involve labor arbitration, that is, arbitration between employers and unions. The focus is on employment arbitration, arbitration between employers and individual employees. Beginning around 1980, nearly all the states judicially modified the standard American doctrine of employment-at-will whereby, absent a statutory or contractual prohibition, an employer could fire an employee “for good cause, for no cause, or even for cause morally wrong.”¹⁰ Under the new regime, grounded in expansive contract and public policy theories, wrongfully discharged employees often reaped bonanzas in court suits, with California jury awards averaging around \$425,000.¹¹ Many employers responded by requiring employees to agree, as a condition for

“contract breach” but whether the “punishment is appropriate to the nature of the offense.” *Id.* at 104. One need not follow Feller to that extent to recognize the value of his insights about arbitrator autonomy.

⁶ DIRECTORY OF U.S. LABOR ORGANIZATIONS 2 (Courtney D. Gifford ed., 1984–85); BUR. LABOR STAT., U.S. DEP’T OF LABOR, UNION MEMBERS SUMMARY 1 (2016) (Unity density in the private sector is now only 6.7%).

⁷ DIRECTORY OF U.S. LABOR ORGANIZATIONS, *supra* note 6.

⁸ Dennis R. Nolan & Roger I. Abrams, *Trends in Private Sector Grievance Arbitration*, in LABOR ARBITRATION UNDER FIRE 69 (James L. Stern & Joyce M. Najita eds., 1997).

⁹ *Id.*; AMERICAN ARBITRATION ASS’N, 2014 LABOR CASELOAD STATISTICAL DATA 4 (May 20, 2015), on file with author; FED. MEDIATION & CONCILIATION SERV., 2014 ANN. REP. 3 (2015). It is estimated, however, that the AAA and FMCS may account for only about a fifth of all labor and employment arbitrations. Others are handled through state agencies, “permanent” umpireships, and direct appointments. *See* Nolan & Abrams, *supra* note 8, at 68.

¹⁰ *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519–20 (1884).

¹¹ JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 24–26, 33–37 (1988); Clifford Palefsky, *Wrongful Termination Litigation: “Dagwood” and Goliath*, 62 MICH. B.J. 776 (1983); BUREAU OF NAT’L AFFAIRS, INC., DAILY LAB. REP. 35 (1987).

getting or keeping a job, that all employment disputes, including statutory claims, would be resolved through arbitration systems established by the employers rather than through suits in federal or state court. The U.S. Supreme Court upheld such mandatory arbitration in the much-debated *Gilmer* case in 1991.¹²

In its lead story on the first page of the Sunday, November 1, 2015 edition, the *New York Times* opened a three-part series with the provocative headline, “Arbitration Everywhere, Stacking Deck of Justice.”¹³ The subhead summed it up, “Vast Trend Locks Americans Out of Court—Rulings Greatly Favor Business.” The article went on to say: “[b]y inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies...devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”¹⁴

All three *Times* articles quite appropriately cite numerous examples of abuses in the arbitration system. But the casual reader will have heard nothing about labor arbitration, where relatively well-matched employers and unions have negotiated a dispute-resolution system that has stood the test of time for its fairness, speed, and economy. More important for our purposes, the *Times* articles make no effort to point out certain advantages of even mandatory arbitration for employees and consumers. The articles thus fail dismally to provide a balanced picture of a complex subject. A more tempered overview will be the aim of the remainder of this paper. Is labor and employment arbitration indeed confronting a mid-life crisis today, or is it actually possible that such arbitration has the opportunity for a new “golden age”?

¹² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (by 2008, 25% of the companies in a survey reported by the American Arbitration Association required nonunion employment disputes to be arbitrated). See ADR News, 2008 *Litigation Trends Survey Released*, 63 DISP. RESOL. J. 7 (2008–09). See also David Lewin, *Employee Voice and Mutual Gains*, in PROCEEDINGS OF THE 60TH ANNUAL MEETING OF THE LABOR AND EMPLOYMENT RELATIONS ASS’N 61–83 (2008) (354 of 757 nonunion businesses surveyed in 2007, or 46.8%, had created employment arbitration programs). Do nonunion arbitration systems provide unions with a new organizing device by representing nonunion grievants? See, e.g., Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682 (2014).

¹³ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2016, at A1.

¹⁴ *Id.*

LABOR AND EMPLOYMENT ARBITRATION TODAY

II. LEGAL DEVELOPMENTS

A. *Evolving Principles*

In concluding in *Gilmer* that an employer could enforce an arbitration agreement to resolve an employee's claim under a statute,¹⁵ the Supreme Court stressed that the employee had suffered no loss of substantive rights; it was merely a change of forum.¹⁶ Moreover, the employee was not precluded from filing a charge with the Equal Employment Opportunity Commission; only his own court action was barred.¹⁷ It is also very important that the Court declared that there must be no impairment of the employee's capacity to "effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum."¹⁸

In subsequent decisions the Court majority moved considerably away from this emphasis on the need for arbitration to "effectively vindicate" the employee's rights.¹⁹ Several of these cases involved mandatory consumer

¹⁵ The statute at issue in *Gilmer* was the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2012).

¹⁶ *Gilmer*, 500 U.S. at 26–28. *Gilmer's* decision under the Federal Arbitration Act, 9 U.S.C. §§ 1–6 (2012), was reaffirmed in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (holding, 5–4, that the FAA exempts only contracts of transportation workers from judicial enforcement of arbitration agreements). For a fuller picture of the legal status of arbitration before *Gilmer*, see generally John Kagel, *Arbitration and Due Process: The Way We Were at the Time of Gilmer*, 11 EMP. RTS. & EMP. POL'Y J. 267 (2007).

¹⁷ *Gilmer*, 500 U.S. at 28. The Court has since held that an individual's agreement to arbitrate employment disputes does not prevent the EEOC from seeking victim-specific relief in court, including reinstatement, back pay, and damages. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The EEOC does not have the resources, however, to litigate all meritorious cases and must leave many to the charging parties to pursue on their own. See, e.g., Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995).

¹⁸ *Gilmer*, 500 U.S. at 28, 30–32 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). In an earlier case, the Supreme Court held an arbitrator's adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing his claim in court that his discharge was racially discriminatory in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2012). *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974). There, the Court concluded that, unlike in *Gilmer*, the arbitrator was not authorized to prevent subsequent statutory claims. *Id.* at 59. The Court in *Gilmer* also found that *Gardner-Denver* involved a "tension" between union representation and individual statutory rights. *Gilmer*, 500 U.S. at 35.

¹⁹ See Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence* (forthcoming; draft on file with author, at 34–35), for a detailed account of

arbitration rather than employment arbitration but the principles are potentially applicable to both. In *Green Tree Financial Corp-Ala. v. Randolph*, the Court recognized that large arbitration costs could prevent a party from vindicating federal statutory rights but held (5-4) that the party resisting arbitration had the burden of proving that fact.²⁰ The mere “risk” of such prohibitive costs was “too speculative.”²¹

Two more recent David-and-Goliath commercial cases effectively shrunk the slingshot in the weaker parties’ hands. In each instance, the mandatory arbitration agreement prohibited class actions in any arbitration. In *AT&T Mobility LLC v. Concepcion*, cell phone customers brought a class action in federal court to prevent an allegedly fraudulent sales tax charge of \$30.²² Lower courts denied the company’s motion to compel arbitration on the grounds that the denial of class actions in these circumstances was unconscionable under California state law.²³ Without grouping claims, pursuit of them was financially unfeasible. Section 2 of the Federal Arbitration Act makes arbitration agreements valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁴ Nonetheless,

this story. See also Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 202–04 (2014).

²⁰ *Green Tree Financial Corp-Ala. v. Randolph*, 531 U.S. 79, 89–91 (2000).

²¹ *Id.* at 91. But cf. *Nesbitt v. FCHN, Inc.*, 811 F.3d 371, 380–81 (10th Cir. 2016) (Plaintiff met burden of showing prohibitive costs and arbitration was denied). *Randolph* would apparently have left the adequacy of arbitration in vindicating rights to be decided by the courts on a case-by-case basis. *Randolph*, 531 U.S. at 90–92. Later, the Court seemed to indicate the issue should be handled by the arbitrator, at least in the first instance. See *PacificCare Health Sys. v. Book*, 538 U.S. 401, 405–07 (2003). On the question of arbitration costs, a distinguished labor scholar and former arbitrator, Judge Harry Edwards, wrote for a federal court of appeals in declaring that a mandatory employment arbitration agreement would be upheld only if, *inter alia*, the employer would pay all the arbitrator’s costs in resolving the employee’s claims. *Cole v. Burns Int’l Security Services*, 106 F.3d 1465, 1482 (D.C. Cir. 1997). That bright-line judicial rule would be far more protective of employees, preferably in my view with the qualification that claimants could be required to pay a filing fee no greater than that required by the applicable federal district court.

²² *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011).

²³ See *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100, 1103 (2005) (class action waivers unconscionable when designed to prevent recovery of relatively small monetary claims). California would apply that rule to contracts generally, not just arbitration agreements.

²⁴ 9 U.S.C. § 2 (2012). Several federal courts of appeals have adopted the very technical requirement that to fall within the savings clause, the state rule must apply to *all* contracts, since the FAA speaks of “any contract.” David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1231–1232 (2013). Cf. *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 431–34 (9th Cir. 2015)

LABOR AND EMPLOYMENT ARBITRATION TODAY

the Supreme Court held (5–4) that the FAA preempted the state law because it stood as “an obstacle to the accomplishment” of the FAA’s objectives with the “overarching purpose of the FAA” being described as “the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”²⁵ For the majority, Justice Scalia castigated class actions in arbitration as overly formal, slower, costlier, and riskier for defendants.²⁶ The Court concluded that arbitration is “poorly suited” to class actions,²⁷ despite its common use in “policy” or class grievances in labor arbitration. Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan.²⁸

In the second case, *American Express Corp. v. Italian Colors Restaurant*, a group of merchants that accepted Amex credit cards brought a class action alleging the company used its monopoly power to extract excessive transaction fees.²⁹ The plaintiffs responded to Amex’s motion to compel arbitration by submitting an economist’s declaration that the cost of proving a federal antitrust violation would vastly exceed any individual plaintiff’s likely recovery.³⁰ Speaking again through Justice Scalia, the Court first noted that the FAA’s text “reflects the overarching principle that arbitration is a matter of contract.... And consistent with that text, courts must ‘rigorously enforce’ arbitration agreements according to their terms.”³¹ The Court went on that no congressional command in the antitrust laws required rejection of the waiver clause. Indeed, the “effective vindication” exception was said to have originated in dictum.³² Summing up, the Court declared that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”³³ The Court thus held (5–3) that the waiver clause was valid.³⁴

(declining to enforce class action ban on grounds state law applied to any such contract provision in a court action). FAA policy barring discrimination against arbitration would seem satisfied if the state law applies generally to the contract provision at issue in arbitration.

²⁵ *Concepcion*, 563 U.S. at 344, 352.

²⁶ *Id.* at 344–51.

²⁷ *Id.* at 350.

²⁸ *Id.* at 357. Justices Breyer and Kagan, however, now seem to acquiesce in the *Concepcion* approach to claims under state law, as seen in *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 464–65 (2015) (6–3 decision).

²⁹ *Am. Express Corp. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2306 (2013).

³⁰ *Id.* at 2308.

³¹ *Id.* at 2309 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

³² *Id.* at 2310.

³³ *Id.* at 2311.

³⁴ *Id.* at 2312.

Justice Kagan was joined by Justices Breyer and Ginsburg in dissent, arguing strongly that *Italian Colors* was quite different from *Concepcion*.³⁵ For Justice Kagan, the key was that *Concepcion* was a preemption case, with the FAA prevailing over a conflicting state law, while *Italian Colors* involved rights under federal antitrust statutes, so that the effective-vindication principle was directly implicated.³⁶

Justice Scalia was a master logician. The trouble with pure logic, however, is that an unsound premise can lead one unerringly to a faulty conclusion. Justice Scalia had to deny the premise that the “effective vindication” of rights was the underlying prerequisite that justified *Gilmer* and its progeny in substituting arbitration for court actions in pursuing substantive rights, most specifically federal statutory rights. Only the exclusion of that basic premise from the syllogism enabled Justice Scalia to make what appears a fairly plausible and logical case. In its place Justice Scalia invoked the seemingly absolute premise that the FAA requires, absent congressional demurral, the rigorous enforcement of arbitration agreements according to their terms, as if there were no longer any role for judicial intervention on public policy grounds. That is the unsound premise on which Justice Scalia based his case against unconscionability.

One might also ask Justice Kagan why the federal-state law distinction is so important in this particular context. Apart from the federal supremacy aspect, state substantive rights to freedom from some type of categorical discrimination (race, sex, age, disability, and so on) may be just as precious to employees as corresponding civil rights under federal law. Finally, if Justice Kagan insists on the presence of a federal right to offset arbitration according to the contract’s terms, why is there not a *federal* theory of unconscionability under the FAA to counter the waiver of the only realistic way of vindicating some vital substantive rights through arbitration, regardless of whether the latter are federal or state rights? Unconscionability doctrine finds “deep roots both in law and equity.”³⁷ Unconscionability as a basis for not enforcing unfair contracts is now a pervasive and well-nigh universally accepted concept. It should be a central fixture of federal as well as state law.

³⁵ *Express Corp. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Justice Sotomayor did not participate).

³⁶ *Id.* at 2319–20.

³⁷ 7-29 CORBIN ON CONTRACTS § 29.2 (Joseph M. Perillo rev. ed. 2002), LexisNexis (database updated 2016). *See also* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965) (Congress adopted the Uniform Commercial Code with its § 2-302 on unconscionability for the District of Columbia); RESTATEMENT (SECOND) OF CONTRACTS § 234 (AM. LAW INST. 1981).

LABOR AND EMPLOYMENT ARBITRATION TODAY

The National Labor Relations Board has weighed in on class actions, drawing a distinction between consumer cases and employment cases. In *D.R. Horton, Inc.*,³⁸ the Board held (3–2) that employees’ rights under Section 7 of the NLRA to engage in concerted activities includes the right to file group or class actions. A mandatory arbitration agreement purporting to waive that right thus violates Section 8(a)(1) of the Act. Since this implicates a substantive right, the Board ruled that the FAA would not require enforcement of the arbitral agreement. In rejecting the Board’s decision invalidating the class-action waiver, the Fifth Circuit reasoned that the bringing of class actions is only a “procedural right”, and therefore, the FAA’s substantive support for arbitration prevails.³⁹ The NLRB has stuck to its guns, reaffirming *D.R. Horton* in *Murphy Oil USA, Inc.*⁴⁰ In *Lewis v. Epic Systems Corporation*,⁴¹ the Seventh Circuit agreed with the Board, setting up a circuit conflict that the Supreme Court will eventually have to resolve. Several academic studies side with the Board.

What should a court do if it concludes the arbitration provisions are so one-sided and extensive that the unconscionability is pervasive and the unconscionable terms cannot be severed without rewriting the contract? Upon a court’s finding of unconscionability, the Restatement and the UCC provide that the court “may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”⁴² The Supreme Court granted certiorari and later dismissed a case where the arbitration clause shortened the limitations period to six months, the employee had to select the arbitrator from a list of three designated by the employer, the filing fee was \$2,500, and a

³⁸ 357 N.L.R.B. 2277, 2277 (2012) (3–2 decision), *enforced in part and enforcement denied in part sub nom.* *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). *Accord* *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam).

³⁹ *D.R. Horton*, 737 F.3d at 357.

⁴⁰ *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (3–2 decision).

⁴¹ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 2016 U.S. Dist. LEXIS 141790 (W.D. Wis. Oct. 13, 2016); *Accord* *Morris v. Ernst & Young LLP*, ___ F.3d ___ (9th Cir. Aug. 22, 2016). Several academic studies also side with the Board. *See, e.g.*, Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of D.R. Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 182 (2014); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1035-36 (2013); Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 918 (2015).

⁴² RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *Accord* U.C.C. § 2-302(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977).

losing employee had to pay the employer's costs and attorney fees.⁴³ The lower federal court refused to compel arbitration. The Supreme Court would have had to decide whether the FAA preempts California state law and requires the severance of the unconscionable provisions and enforcement of the agreement to arbitrate.

A holding of preemption here would not only destroy the desirable flexibility provided to the courts in dealing with unconscionability under both the *Restatement* and the *Uniform Commercial Code*. It would also cement in the old troublesome effect of a court choosing the compromise of severing unconscionable clauses and enforcing the remainder of the contract. Many uninformed employees will never challenge the unconscionable provisions and will simply go along with the whole contract as written.

B. *Arbitration of Public Law Rights Under Collective Bargaining Agreements*

In *14 Penn Plaza LLC v. Pyett*,⁴⁴ the Supreme Court answered a question that had been hanging fire for thirty-five years, since the earliest in this string of cases dealing with the arbitration of statutory claims of employment discrimination.⁴⁵ The Court held (5–4) that a union could waive the rights of represented employees to take such claims to court by a provision in a collective bargaining agreement that “clearly and unmistakably” required them instead to use the arbitration procedures of the labor contract.⁴⁶

Pyett has had a very mixed reception. One leading scholar said the Court had “decided that an agreement between defendants and potential defendants can deprive a plaintiff of a congressionally authorized cause of action, forcing plaintiffs instead into labor arbitration that a plaintiff never chose, does not want, cannot influence, and, on the facts of the case, will never take place

⁴³ *MHM Gov't Servs., Inc. v. Zaborowski*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013), *aff'd*, 601 Fed. Appx. 461 (9th Cir. 2014), *cert. granted*, 136 S.Ct. 27 (2015), *cert. dismissed*, 136 S. Ct. 1539 (2016).

⁴⁴ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 248 (2009).

⁴⁵ See *supra* note 18.

⁴⁶ A union member also appears to retain the right to file charges with the EEOC or the NLRB. *Pyett*, 556 U.S. at 272. See also Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 213 (2014). Cf. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 82 (1998) (where the waiver at issue was not “clear and unmistakable”).

LABOR AND EMPLOYMENT ARBITRATION TODAY

anyway.”⁴⁷ But another major academic and a junior collaborator stated that *Pyett*, “while not elegantly grounded in sophisticated jurisprudential metaphysics, may nevertheless work well and yield just and fair results for employees, employers, and unions who favor a single, integrated arbitration forum for the resolution of all contractual and statutory claims.”⁴⁸

We do not yet know how many unions and employers will opt to follow *Pyett*. I have heard prominent union lawyers say their organizations find it politically risky to waive members’ statutory rights to take their case before a judge and jury. Yet in many circumstances, employees might gain by having quick and easy access to a familiar arbitral procedure, with representation by a “repeat player” like the union. And presumably the union’s agreement to waive the judicial option could secure some return job benefits for the whole bargaining unit. It also should not be forgotten that in *Gardner-Denver*—the original case preserving a second bite at the statutory apple after the grieving employee had lost in the arbitration of the contractual claim—the grievant lost in his court action as well.⁴⁹ Second bites may not be all that tasty.

Unlike in *Gilmer*, where the waiver of court suits was imposed by the stronger employer party on the weaker individual employee, in *Pyett* the waiver was negotiated by a labor organization chosen by a majority of the employees in the bargaining unit as their agent. In handling a represented employee’s claims, unions of course are subject to the duty of fair representation.⁵⁰ Both the courts and the NLRB can enforce that obligation. On balance, I am satisfied that *Pyett* could offer a win-win opportunity for all parties. My major reservation is to question whether a union should be able to waive the employees’ right to sue the union itself, even though it may waive their right to sue the employer. That may be too much of a conflict of interest. But in any event, the duty of fair representation will be enforceable.

⁴⁷ Alan Hyde, *Labor Arbitration of Discriminating Claims after 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. DISP. RES. 975, 975 (2010).

⁴⁸ David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J. L. & PUB. POL’Y 429, 429–30 (2010).

⁴⁹ See *supra* note 18.

⁵⁰ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 195–96 (1967); BARBARA T. LINDEMANN, PAUL GROSSMANN & C. GEOFFREY WEIRICH, *EMPLOYMENT DISCRIMINATION LAW* 23–13 to 23–27 (5th ed. 2012).

III. EVALUATIONS AND RECOMMENDATIONS

A. *Pros and Cons of Mandatory Arbitration of Public Law Claims*

No Supreme Court decision of the last half-century in labor and employment law produced such a hostile outcry from relatively disinterested sources as *Gilmer's* endorsement of mandatory arbitration of individual employees' statutory claims. Numerous scholars, two federal agencies, and two prestigious panels, one government-sponsored and one private, registered vigorous opposition.⁵¹ An old-fashioned, spread-eagle speaker might well

⁵¹ See, e.g., EEOC, *Alternative Dispute Resolution Policy*, 8 LAB. REL. REP. (BNA) FEP 405:7301, 405:7302 (1997); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 454 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004). In July 1997, the EEOC issued a longer and even stronger condemnation of compulsory arbitration or pre-dispute agreements to arbitrate, declaring that "even the best arbitral systems do not afford the benefits of the judicial system." EEOC, *Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 LAB. REL. REP. (BNA) FEP. 405:7511, 405:7520 (1997). According to the court in *Cole v. Burns Int'l Sec. Servs.*, the NLRB General Counsel was once prepared to issue unfair labor practice complaints on the issue. 105 F.3d 1465, 1479 (D.C. Cir. 1997). See also COMMISSION ON THE FUTURE OF WORKER-MGMT. REL., U.S. DEP'TS OF COMMERCE AND LABOR, REPORT AND RECOMMENDATIONS 33 (Dec. 1994) [hereinafter DUNLOP COMMISSION REPORT]; National Academy of Arbitrators, *Statement on Condition of Employment Agreements*, in 50 ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE 50TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 312 (Joyce M. Najita ed. 1998). The NAA softened its opposition somewhat on May 20, 2009, stating that "voluntary arbitration is always preferable," and "it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration." See National Academy of Arbitrators, *Policy Statement on Employment Arbitration* (May 20, 2009), available at www.naarb.org/due_process/due_process.html.

More recently, Section 6 of Executive Order No. 13673 (July 31, 2014), 79 Fed. Reg. 45309, 45314 (Aug. 5, 2014), required all federal contracts for supplies or services in excess of one million dollars to impose strict limits on pre-dispute arbitration agreements. An agreement to arbitrate claims under Title VII of the 1964 Civil Rights Act or claims of sexual assault or harassment may be made only with the voluntary consent of employees and after a dispute has arisen. The Department of Labor issued rules implementing the

LABOR AND EMPLOYMENT ARBITRATION TODAY

have put it this way: “No honest, hard-working American should be required to surrender a statutory right to a jury trial as the price for getting or keeping a job.” Even without the rhetorical flourish, there is much substance in that assertion. Yet, practical experience and some reliable empirical studies over the years make the subject considerably more complex and cloudy. Perhaps the one proposition that all disinterested observers would accept is that there are enormous differences between one nonunion employment arbitration and another, depending on whether the arbitral agreements were individually negotiated or unilaterally imposed by the employer; whether they involve an executive, a TV anchor, or a blue-collar worker; whether substantial sums or only modest amounts of money are at stake; whether the parties are represented by legal or other competent counsel; how the arbitrator was selected; how case administration is handled; how the fees and costs are allocated; what procedures are followed; what restrictions exist (e.g., a ban on class actions); and what remedies are available.⁵² My primary concern is the rank-and-file employee subject to an employer-mandated arbitration arrangement. I am also less concerned with abstract theory than with practical consequences.

Professor Alexander Colvin of Cornell, who has investigated the subject extensively, concludes broadly that “mandatory arbitration exacerbates inequality in access to justice in the workplace.”⁵³ He has four specific reasons.⁵⁴ First, the employer changes the rules for enforcing rights, setting up the arbitration system unilaterally, and often banning class actions.⁵⁵ Second, arbitration impairs the employee’s bargaining leverage by reducing the risk of the larger damage awards that are likelier in court litigation (especially jury trials) than in arbitration.⁵⁶ Third, the lesser economic damages in arbitration are a disincentive for attorneys operating on contingent fees and thus a barrier

Executive Order, effective October 25, 2016. 81 Fed. Reg. 58651 (Aug. 25, 2016). The practical effect will be a sharp reduction in the use of *any* arbitration in these situations. Once a dispute has arisen and the nature of the claim is known, most employers will decline to arbitrate small claims, knowing the employee will find it hard to get a lawyer to take the case to court. If the claims are large ones, the employees and their lawyers will want to get into court and before a jury. See COMMISSION OF THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 118 (1994). The cost-and-time-saving attractions of arbitration are most appealing to both parties before the dispute occurs.

⁵² For an excellent overview of these differences and their significance, see generally Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014).

⁵³ *Id.* at 90.

⁵⁴ *Id.* at 89–90.

⁵⁵ *Id.* at 89.

⁵⁶ *Id.*

to representation.⁵⁷ Fourth, the adoption of mandatory arbitration may have adverse effects on the employer's internal conflict resolution procedures.⁵⁸ There is force to all these contentions but there are other offsetting factors that must be taken into account.

Professor Colvin is largely correct on his first point about employer unilateralism. But much of that problem could have been ameliorated by greater judicial oversight and the doctrine of unconscionability, were it not for Supreme Court decisions like *Concepcion* and *Italian Colors Restaurant*.⁵⁹ Moreover, Professor Colvin omits a very important consideration. I myself have conducted only some half dozen mandatory employment arbitrations. They were all discharge or discipline cases and, except for a case referred by a court, they were primarily based on contract and not statutory claims. Along with imposing an arbitration system as the means of resolving any job dispute, the employers had adopted the policy that employees would not be discharged or disciplined without "good cause." In effect, employees had *new* substantive contract rights because the employer had chosen arbitration as the means of enforcing all employment rights. That is not an uncommon combination. Although "[a]round half" of the AAA cases studied by Professor Colvin involved employment discrimination claims,⁶⁰ another AAA study by Cornell Professor Theodore Eisenberg and Elizabeth Hill found that only 19.5% dealt with statutory civil rights claims.⁶¹ The vast majority in the latter study were based on individual contracts or personnel manuals. Rights in manuals would have been employer-generated and many might not have existed but for the contemporaneously created arbitration system.

There is no question that if employees win in a court action, they generally receive more than when they win in an arbitration. That is especially true if it is a jury case.⁶² I have no doubt that affects what cases a lawyer undertakes on a contingent fee. But we must be careful about a comparison of apples and oranges when Professor Colvin finds that lawyers take on about twice the percentage of cases that could proceed to court (15.8%) than of those that were covered by mandatory arbitration agreements (8.1%).⁶³ How many of the latter claims involved such low dollar amounts that they would not have

⁵⁷ *Id.*

⁵⁸ *Id.* at 90.

⁵⁹ See *supra* text at notes 22 and 29.

⁶⁰ Colvin, *supra* note 52, at 80.

⁶¹ Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 44, 49.

⁶² See comments of leading management, union, and employee counsel *infra* Parts IV-B, IV-C.

⁶³ Colvin, *supra* note 52, at 85.

LABOR AND EMPLOYMENT ARBITRATION TODAY

justified the greater litigation expense of a court action? How many were “good cause” discharge cases that might not have existed at all without the arbitration system?⁶⁴ And any frustrated plaintiff’s lawyer will tell you about the readiness of federal judges to throw out claims on summary judgment in cases that do reach court. In any event, another study of AAA cases concluded that employees having less than a \$60,000 annual income (or an equivalent claim) generally cannot afford court litigation, but arbitration remains a viable option.⁶⁵ In 2013, the median income of full-time, year-round workers under 65 years of age in this country was only \$45,899.⁶⁶ In the informal setting of arbitration, however, it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer. I have seen it done successfully.

By now it should be clear that reputable studies in this area by respected scholars can be remarkably divergent. In a careful, balanced study of the relative costs of arbitration and court suits, Professor Christopher Drahozal of the University of Kansas concluded: “The empirical evidence suggests that arbitration may be a more accessible forum than courts for lower income employees and consumers with small claims.”⁶⁷ Lewis Maltby, President of the National Workrights Institute, has been opposed to mandatory arbitration as a matter of principle. Yet after studying the available data, Maltby concluded that twice as many employees could afford to go to arbitration as could afford court suits.⁶⁸

⁶⁴ I realize there is no necessary connection between “good cause” contract rights and mandatory arbitration. But the two often come as a pair and the coupling belongs in any analysis of the practical realities.

⁶⁵ Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May-Jul. 2003, at 8, 10–11.

⁶⁶ Selected Characteristics of People 15 Years Old and Over by Real Money Income in 2013, Work Experience in 2013, Race, Hispanic Origin, and Sex, U.S. CENSUS BUREAU (Sep. 16, 2014), https://www2.census.gov/programs-surveys/cps/tables/pinc-01/2014/pinc01R_1_1_1.xls.

⁶⁷ Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM. 813, 840 (2008).

⁶⁸ Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F.L. REV. 105, 117 (2003). In 2015, Maltby surveyed the practice of two leading plaintiffs’ law firms. Of 301 would-be employee clients who stated a valid cause of action, 112 (37%) were turned down because their damages were inadequate or they couldn’t afford counsel fees. Inquiries were made of the 112 rejects. Of the 26 who responded, 16 (62%) were unable to secure other counsel. Maltby summarized: “A significant number of people with legitimate cases are denied access to justice because their cases don’t have high enough damages to interest the private bar.” (Reports are on file with the author.) What if arbitration had been available?

Ease of access to an effective forum for redressing wrongs is important. So are the resulting outcomes. Here too, the figures on arbitration and court litigation are all over the plot. In different empirical studies I have reviewed, arbitration was surprisingly favorable to employees as compared with court litigation.⁶⁹ For higher-paid employees, probably grieving under individual contracts, arbitral win rates in various studies ranged between about 40 and 69%. For lower-paid employees, presumably relying on handbook provisions, arbitral win rates were between about 21 and 40%. By contrast the studies found the figures for court cases, most of which were likely to involve higher-paid employees, running between about 12 and 57%. It does not seem improper for Professors David Sherwyn and Michael Heise of Cornell and Samuel Estreicher of New York University to sum up these and other empirical studies by stating that “there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration].”⁷⁰ At worst the differences in outcomes for comparable groups of claimants appear negligible.

Professor Colvin’s own count for employee win rates in nonunion arbitration cases administered by AAA is 21.4%.⁷¹ I found that percentage especially significant because I had examined 200 discharge grievances filed from 1999 to 2007 in one of the country’s oldest and most respected union-management collectively bargained arbitration systems—truly a “gold standard” for arbitration. Employees were reinstated or received other substantial relief in only 46 instances, or 23% of the 200 cases. This was with a “repeat player” union of unquestioned integrity and competence representing the grievants. The closeness of the winning percentage there to that of the employees in the mandated arbitrations reviewed by Colvin suggests that the latter were not being subjected to markedly inferior treatment. I am satisfied from both these empirical studies and my own personal experience that a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist.

B. Due Process

Elsewhere, I have considered more extensively the due process requirements without which any employment arbitration may amount to a

⁶⁹ See Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMP. L. 411, 419 (2010), and authorities cited.

⁷⁰ David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005).

⁷¹ Colvin, *supra* note 52, at 80.

LABOR AND EMPLOYMENT ARBITRATION TODAY

sham.⁷² Three quite diverse groups have developed rather similar procedural standards for protecting employees' rights in these proceedings. They are the so-called Dunlop Commission;⁷³ the Task Force on Alternative Dispute Resolution in Employment, which drafted the much-used but now somewhat antiquated Employment Due Process Protocol;⁷⁴ and the National Academy of Arbitrators, with two separate sets of Guidelines.⁷⁵ The most recent Academy Guidelines, approved by the Board of Governors in May 2014, are probably the most comprehensive and overlap the Dunlop Commission Report and the Due Process Protocol in major respects. They provide *inter alia*:⁷⁶

- The arbitrator must decline any case in which the arbitral system would deny a party due process.
- Arbitrators must know the method of their appointment and cannot take a case if selected by one party or from a panel created by one party.⁷⁷
- The arbitrator has an extensive and continuing obligation of written disclosure to the parties or an appointing agency of all personal, social, professional, financial, or other interests related to a party, representative, or known witness, or any other circumstances that might raise a reasonable doubt about the arbitrator's independence or impartiality.

⁷² See St. Antoine, *supra* note 69, at 421–33.

⁷³ See DUNLOP COMMISSION REPORT, *supra* note 51.

⁷⁴ TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995) [hereinafter DUE PROCESS PROTOCOL], <http://naarb.org/protocol.asp>. The Task Force consisted of management, union, and plaintiffs' attorneys from the American Bar Association and the National Employment Lawyers Association, and representatives of the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution.

⁷⁵ NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES FOR EMPLOYMENT ARBITRATION, http://naarb.org/due_process.asp; NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES FOR STANDARDS OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS IN MANDATORY EMPLOYMENT ARBITRATION, http://naarb.org/Guidelines_for_standards.asp.

⁷⁶ See generally Barry Winograd, *Developing Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration Proceedings*, 35 BERKELEY J. EMP. & LAB. L. 61 (2014) (showing historical development of ethical standards).

⁷⁷ See, e.g., *McMullen v. Meijer, Inc.*, 355 F.3d 485, 487 (6th Cir. 2004). Cf. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (arbitrator-selection panel invalid when established solely by employer).

- If a conflict of interest exists, the arbitrator must decline an appointment, even if all parties waive objection. An arbitrator must withdraw upon a party's timely objection after disclosure, without the need for the party to provide any reason.
- One party may be made solely responsible for all arbitral fees by law, agency rules, or agreement of the parties.⁷⁸
- Arbitrators must inform an unrepresented party that they are neutral and not representing either party, but they may explain the arbitration process to an unrepresented party.
- The arbitrator may order such discovery as seems necessary for a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.
- Arbitrators must make a reasonable effort to address and follow public law whenever public law is at issue in a case. I personally would let the parties narrow the issues and insist that I stick to interpreting and applying the contract; the parties could then have a court address legal issues if necessary. But increasingly, especially in public-sector cases and certainly in federal cases, it is generally assumed that the arbitrator will apply public law.
- Advance deposits for arbitrator fees may be required as a condition for going forward with the arbitration. Deposits must be secured and set aside until the fees are earned.
- Arbitrators must give notice to all parties, and an opportunity to respond, if they believe a case should be decided on a rationale not previously presented by any party.
- Consent awards are permitted if the arbitrator is satisfied that all parties knowingly agreed (and I would add "and seem fair to the arbitrator"). This does not apply to class actions.
- Post-award clarification of the merits is not permitted unless all parties agree but an arbitrator can retain jurisdiction to clarify the interpretation or implementation of the *remedy*.
- Ex parte communications are prohibited, even those regarding compensation, despite desires to spare one side embarrassment. (Would it make a difference if an arbitrator *never* tries to hold the other side responsible on a joint liability theory for the nonpaying side's portion?)

⁷⁸ This is contrary to the Due Process Protocol, but the Protocol was undercut on this point by the *Cole* decision, 106 F.3d at 1484–85.

LABOR AND EMPLOYMENT ARBITRATION TODAY

- Arbitrators may accept or even suggest mediation but they must be clear about the rules of the process, including *ex parte* communications (allowable), and the consequences of a failure in the mediation, including the subsequent role of the arbitrator.
- Arbitrators cannot publish an award without the consent of all parties.
- Arbitrators cannot voluntarily participate in legal proceedings for enforcing an award.

The Academy guidelines say nothing about an arbitrator's handling of a case in which the agreement to arbitrate waives an employee's right to maintain a class action. At the time that issue did not seem as pressing as it became subsequently. Also, in most discharge cases, which are the most common type of grievance, the claim is unique to the individual and not suitable for a class action, and it is important enough for nearly all employees to pursue on their own.

The second set of NAA Guidelines was originally drafted to be a code of binding rules for employment arbitrators, paralleling the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.⁷⁹ The latter Code has been jointly adopted by the NAA, the American Arbitration Association, and the Federal Mediation and Conciliation Service. The Code is subject to enforcement in various ways, including reprimand, suspension, or expulsion by the Academy or suspension or disbarment from arbitration panels by the two designating or appointing agencies. The Academy's enforcement body is the Committee on Professional Responsibility and Grievances.

After discussions with the NAA Board of Governors, however, it was decided for a variety of reasons to make the new proposed set of standards merely guidelines and not formally binding rules. For those Academy members who believe that members handling employment arbitrations should be subject to sanctions for wrongdoing, there was comfort in the increasing recognition that both the history and express wording of the Code for *labor* arbitrators (see the "Foreword" and "Preamble – Background, Scope of Code") support the view that it is equally applicable to *employment* arbitrators. Neither the NAA nor the AAA has taken any official position on this issue. The FMCS rarely handles employment arbitrations.

⁷⁹ The Code is also available on the NAA website at <http://naarb.org/code.asp>.

IV. THE PRACTITIONERS SPEAK

A. *Background*

The College of Labor and Employment Lawyers describes itself as a “fellowship of the most accomplished members of the labor and employment law community.”⁸⁰ The approximately 1,380 Fellows include mostly management, union, and employee attorneys, with some neutrals (arbitrators and mediators), law professors, and government officials, along with a few honorary members such as judges. All Fellows are chosen after a careful and extensive vetting by current members. I thought the knowledge and experience of this selective group would be a fruitful source of insight about the current state of labor and employment arbitration in this country. My aim was not a scientifically constructed survey or statistically significant poll but rather the thoughts of some distinguished practitioners whose merits I could personally vouch for. I sent separate sets of questionnaires to about seventy-five persons, either management attorneys or attorneys for unions and employees. I received fifty-two responses, almost equally divided between the two groups.

B. *Management Lawyers’ Views*

All but two of my twenty-seven management respondents had nonunion clients with mandatory arbitration agreements. The practice is pervasive, covering an average of about half the lawyers’ clientele. At one time or another twenty-one employer lawyers had recommended such agreements for clients and twelve had recommended against them. Some lawyers thus have done both, depending on the client and other circumstances (including changes of mind). A few stated they would spell out the pros and cons and let the client decide without a definite recommendation. All twenty-one who favored mandatory arbitration cited the cost and bother of court litigation. Twelve observed that courts and juries generally awarded higher amounts than arbitrators. Four candidly declared that union-avoidance was a motivation. A number mentioned the privacy and speed of arbitration. Several commented that arbitration was easier for employees and its availability was good for employee morale. Somewhat surprisingly, only three lawyers volunteered, without my inquiring, that the banning of class actions in arbitration was a factor. More may well have agreed if I had specifically asked that question.

⁸⁰ THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, <http://www.laborandemploymentcollege.org/about-the-college/mission> (last visited Oct. 1, 2016).

LABOR AND EMPLOYMENT ARBITRATION TODAY

All the management lawyers recommending against or opposing mandatory arbitration said they wanted summary judgment and arbitrators rarely granted it, and they wanted the full right of appeal for any adverse decisions. Arbitration awards of course are subject to very limited court review. Over half the negative group pointed out that more employees are likely to arbitrate than to sue. A few felt that employees won too often at arbitration and others commented that many arbitrators decide cases on the basis of “fairness” and they preferred judges who are more likely to decide on the basis of the “law.” Some noted that the increasing expense of arbitration was reducing the cost advantage it once had over court litigation.

On a significant subject, the answers ranged from “0%” to “100%” to my query: In what percentage of the nonunion employment arbitration cases you have handled was *public law* (Title VII, ADEA, FMLA etc.) rather than employee handbooks or employer policies the principal issue? The mean average was about 69%. The predominance of civil rights or statutory claims rather than common law contract claims is quite contrary to earlier studies and my own experience⁸¹ and more in accord with the findings of Professor Colvin that “[a]round half of all mandatory arbitration cases...involve employment discrimination claims.”⁸² If the latter calculation is accurate and generally applicable today, it does reduce the force of my argument that mandatory arbitration does not impinge all that much on statutory enforcement procedures and very often provides new reciprocal contractual “just cause” substantive rights.

Turning to traditional collective bargaining arbitration, fifteen of the twenty-seven management lawyers thought that its rate or frequency of use had remained about the same over the last ten–twenty years. Nine of those responding believed there had been significantly less use. I would agree with the observation that even where the rate of filing for arbitrations has held up, there has been a marked trend toward more settlements prior to any scheduled hearing.

When I asked about specific complaints concerning traditional labor arbitration, there were remarkably few. One person thought the process took too long. Two felt it had become too legalistic or complex. Three believed arbitrators charged too much. Five considered mediation a superior means for resolving disputes. Could this broad lack of grievances be explained by the successful, prestigious nature of the group I was soliciting for opinions? In any event, a few were more outspoken when I asked open-endedly about any other complaints or concerns. The nature or quality of the union involved was said

⁸¹ See *supra* text at notes 59–61.

⁸² See Colvin, *supra* note 52, at 80.

to make a big difference in all aspects of the relationship, including arbitration. Unions can file grievances on a reasonable basis or as a harassment device, they declared. Union leadership may have suffered because of money shortages and because talented younger people no longer aspired to official roles in their unions. Arbitration is less needed because the parties have become more experienced in predicting outcomes and can settle cases on their own. It takes too long to get an experienced arbitrator in a case. Arbitrators still like to “split the baby,” as in awarding reinstatement without back pay. (Some of us believe that in certain circumstances that can be exactly the appropriate award and not a pandering compromise.) The NLRB was said to be less ready now to defer to arbitration.

These management lawyers reported that in most traditional labor arbitrations, public law as distinguished from contract law based on the collective bargaining agreement played little or no role. I calculated the mean average of the individuals’ arbitrations in which public law was the principal issue as about 12%. Eight of the twenty-seven employer attorneys had unionized clients with so-called *Pyett* agreements, requiring individual employees to abide by the collective bargaining procedures for arbitration of *statutory* claims rather than take such cases to court. But for those with such clients, a mean average of about 50% of their individual clients had *Pyett* agreements.

Subsequently, I asked about any general observations concerning arbitration or union-management relations. Several commented on the need to get good new arbitrators to replace those retiring from the scene, and on the vital importance as well of getting these newcomers known to the labor and employment community through “meet and greet” sessions and the like. Some management attorneys believe that unions are not responding adequately to the new and different needs of today’s workforce. Others focused on complex arbitrations and suggested that unions should be sure to use lawyers or professional consultants for such cases. In summing up the virtues of mandatory arbitration for management, the group emphasized the avoidance of “runaway juries,” and the well-recognized value of jointly selecting the decision-maker, controlling scheduling, and maintaining privacy and informality—despite the continuing problems of delay and cost. Overall, the responses were fairly optimistic about arbitration.

This twenty-seven-person group of management lawyers spent a mean average of approximately 38% of their time on traditional union-management practice (organizing, negotiation, arbitration etc.), and approximately 61% of their time on nonunion employment matters (statutory claims, employer policies, nonunion arbitration, etc.). That should be no surprise in this era of union decline. They also spent a mean average of approximately 87% of their

LABOR AND EMPLOYMENT ARBITRATION TODAY

time in the private sector and only 13% of their time in the public sector. Since the public-sector union workforce now slightly exceeds the private-sector union workforce, there must be some special reasons that this select group spends so much more time in the private sector. Factors might include greater employment compression in the public sector (fewer units than in the private sector, enabling more efficient servicing); the greater acceptance of unionism in those parts of the public sector where it has been established and thus fewer life-or-death legal problems); and a tendency of the ablest lawyers to gravitate toward the private sector's more remunerative practice.

C. Views of Union/Employee Lawyers

Twenty-five lawyers representing unions or employees responded to my survey. Five of those do no union-management labor relations work. The remaining twenty took a dimmer view of the current state of traditional collective bargaining labor arbitration than did the management representatives. Only six on the union side thought the frequency of arbitration was about the same as ten to twenty years ago, while fourteen believed there was substantially less use. Complaints were numerous. Arbitration takes too long (twelve responders). It has become too legalistic or complex (ten) and arbitrators cost too much (ten). Five persons considered mediation generally a superior mode of dispute resolution. More general comments included the notion that arbitrators were now less sympathetic to workers in discharge cases than formerly, perhaps because of economic or generational changes. Others said arbitrators' written opinions too often merely repeat the parties' arguments and do not provide carefully reasoned analyses.

Union lawyers estimated that in traditional collective bargaining arbitration, *public law* rather than the parties' labor contract was the principal issue in a mean average of 21.6% of the cases (the management lawyers had estimated 12%). Five lawyers had union clients with *Pyett* agreements, requiring employees to follow contractual arbitration procedures rather than sue on *statutory* claims. No lawyers recommended that their union clients seek such a provision. But one lawyer commented that the bargaining unit received a good quid pro quo for agreeing to a *Pyett* provision, and that probably more employees could get to arbitration with union representation than could afford to go to court.

Eleven of these twenty-five lawyers had represented *nonunion* employees in arbitrations under mandatory employment arbitration agreements. They estimated that in a mean average of 60% of the cases, public law rather than contract law (employee handbooks, employer policies, oral commitments, etc.) was the principal issue (management lawyers had a mean average of

68.7% public law). My survey asked how they felt a court would likely have ruled for or against the employees in comparison with the arbitrator in their nonunion cases. Four said about the same; three, a court was more likely to rule for the employees (but one qualified that a jury more likely but not a judge); and three, a court was less likely to rule for the employees. I then asked, assuming an employee “won,” whether arbitrator or court was likely to provide the more extensive remedy. One said about the same; six, a court (again, one said a jury but not a judge); and two, the arbitrator. Several lawyers added that courts issue many more summary judgments than arbitrators.

The estimated division of time spent by these union/employee lawyers on traditional union-management matters (organizing, negotiation, labor arbitration, etc.) and on nonunion matters (statutory claims, employer policies, nonunion employment arbitration, etc.) was 60%–40%. That is almost the exact reverse of the figures for management attorneys, 38%–61%. And that is despite the fact that five persons in the union/employee group do no conventional labor relations work at all. But on further reflection a 60–40 distribution of work between “labor” and “employment” should not be surprising for this particular set of lawyers. There is simply more nonunion employment law work to be done on the management side. For employers, the decline of unions since the 1950s, the broad expansion of federal statutes dealing with job discrimination, occupational safety and health, pension reform, and common-law wrongful discharge developments all tilted work law sharply away from the former emphasis on union-management relations. For labor organizations, however, the older, different emphasis largely remains. Most union-and-employee-side members of the College of Labor and Employment Lawyers continue in a milieu more similar to that earlier, less variegated era.

V. CONCLUSION

These days there is much talk about income inequality, and in certain circles even much talk about the need for working people to enjoy a living wage and human dignity. Indeed, Professor Colvin’s cumulative objections to mandatory employment arbitration are summed up by saying it “exacerbates inequality in access to justice in the workplace.”⁸³ The more the facts would bear out those assertions, the more I would agree with Colvin. But I find the evidence very mixed and inconclusive.

Colvin is surely correct that employers’ unilateral imposition of a particular arbitration system enables them to include provisions tilting the

⁸³ Colvin, *supra* note 52, at 90.

LABOR AND EMPLOYMENT ARBITRATION TODAY

playing field in their favor. More vigorous judicial oversight through the well-established doctrine of unconscionability would have greatly reduced the risk of unfairness in mandatory arbitration, were it not for the overly broad reading of the Federal Arbitration Act by Justice Scalia and the then-existing five-person majority of the Supreme Court in *Concepcion* and *Italian Colors Restaurant*.⁸⁴ Even so, many mandatory arbitration systems have been accompanied by provisions highly favorable to employees, namely, requiring good cause for discharge or discipline. That is a major benefit for nonunion workers in at-will-employment America. Professor Colvin may be right that earlier studies exaggerated the percentage of arbitration claims based on contract (employee handbooks and the like); he concluded that statutory claims were 54% of the total under employer-promulgated plans.⁸⁵ That does add to the practical significance of the decision in *Gilmer* to allow one of two parties in an employment relationship to require the enforcement of sensitive public rights by private means. It still leaves up to some 40% of arbitration claims based on employer-granted contract rights, which is a substantial number. In the handful of mandatory arbitration cases I myself have handled, the primary issue in all but one was a contract claim derived from a personnel manual, not a statutory claim. These contract claims might not have existed but for the accompanying arbitration provisions. And even a statutory claim might not have been worth the cost of a court action but could have been worth pursuing in arbitration.

I have no doubt that if an employee has a large monetary claim and can manage to get by the summary-judgment stage where so many federal cases end, a jury trial is likely to produce a bigger award than an arbitration. Almost any plaintiff's lawyer operating on a contingent fee basis will naturally prefer a court action if there is sizable potential liability. Yet my principal concern is the lower-paid, blue-collar worker who does not have a substantial monetary claim but whose job and livelihood are at stake. And I have seen nothing that refutes the AAA study concluding that employees having less than a \$60,000 annual income generally cannot afford court litigation.⁸⁶ That is the economic zone where most rank-and-filers live, many not that far above the poverty line. For them arbitration remains the most viable option. Whatever may be the theoretical or practical objections to mandatory employment arbitration, I have seen nothing that would offset the pragmatic grounds for allowing its

⁸⁴ See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011); *American Express Corp. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

⁸⁵ Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. DISP. RESOL. 59, 68 (2014).

⁸⁶ Hill, *supra* note 65, at 10–11.

continuation, subject to appropriate due process requirements. It can often be the sole route to justice for the neediest.

What about the future of traditional collective-bargaining labor arbitration? Despite a decline of about 50% in the issuance of arbitration awards from the 1970s to the present, the members of the College of Labor and Employment Lawyers who responded to my survey were rather upbeat concerning the process. This was especially true on the management side. A comfortable majority (15–9) of the employer lawyers thought the frequency of labor arbitration use had remained about the same over the last 10–20 years. Union counsel were less sanguine, thirteen out of twenty believing there was significantly less use. Union attorneys also had more complaints about the length, complexity, and cost of arbitration. Five lawyers in each group felt that mediation was a superior method of dispute resolution. But I consider it meaningful that, when I asked for open-ended comments by this select group, no one on either side suggested the imminent demise of the process or pointed to fatal defects in it. Of course the very fact this was an elite, successful group may have made for a more positive outlook than might be found among labor practitioners generally.

So, how do I answer my own question: are today's systems of labor and employment arbitration in a midlife crisis or headed for a new golden age? On the evidence before us, I believe a good argument could be made for either or *both* positions as to *both* systems—simultaneously! And there are significant implications for the profession of private arbitrators. Specifically, the future of labor arbitration as now conducted by unions and management will turn on what happens to the various possible forms of employee representation. In recent years a spate of books and articles has reviewed the changes in the workplace wrought by the so-called “gig economy,” including contingent employees, independent contractors, and subcontracting, and by franchising, automation, and work centers catering to union employees' economic and legal needs but generally disclaiming collective bargaining.⁸⁷ The basic notion is that the old system of employee organization and representation under the NLRA simply does not fit the new world of diffused and shifting employment.

⁸⁷ See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010); Samuel Estreicher, “*Easy In, Easy Out*”: *A Future for U.S. Workplace Representation*, 98 MINN. L. REV. 1615 (2014); Janice Fine, *New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 REL. INDUSTRIELLES/INDUS. REL. 604 (2011); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010); Noam Scheiber & Brian X. Chen, *In Verizon Strike, Blue-Collar Stress Hits Sidewalks*, N. Y. TIMES, April 14, 2016, at B1.

LABOR AND EMPLOYMENT ARBITRATION TODAY

There has even been involvement by state and municipal governments in private employment dispute resolution.⁸⁸

It may well be that the former dichotomous distinction between labor law and employment law is breaking down.⁸⁹ In any event, I remain cautiously optimistic that over time, our political and legal system does respond to the legitimate needs and demands of large numbers of the citizenry. That is shown even by our recent otherwise inglorious presidential nominating campaigns. Income inequality and other job inequities have become widely recognized as subjects requiring much more attention. And individuals usually find strength in groupings, in one form or another. Unions dealing with employers at given geographic work sites may have to give way to new types of employee or worker associations operating across broader industry lines. But the need for problem-solving and dispute-resolution systems will continue.

One development in alternative dispute resolution might be an extension of the increasingly popular resort to mediation. In mediation a neutral third party does not impose a particular solution on the contending parties but seeks to get them to agree on a voluntary settlement. Yet human nature being what it is, many cases will defy closure consummated by the participants themselves. Something in the nature of arbitration and decisions by neutral outsiders will persist. Regardless of whether we call the disputants unions and employers or just claimants and something else, whether or not government plays an ever more significant part, and whether the process is known as labor or employment arbitration or simply workplace dispute resolution, an essential feature is likely to remain a system of private neutrals providing fair and timely decisions covering the appropriate segment of working persons.⁹⁰ If the inquiries I receive from many people, both young and not so young, are any

⁸⁸ See generally JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016) (discussing the importance of government in promoting social and economic progress); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011) (declaring that primacy of federal labor law has not prevented cities and states from working with unions and employers to reorder union organizing and bargaining rules).

⁸⁹ See, e.g., Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, in *THE IDEA OF LABOUR LAW* 88 (Guy Davidov & Brian Langille eds., 2011); JACOB ROSENFELD, *WHAT UNIONS NO LONGER DO* (2014); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008).

⁹⁰ Even in government-sponsored arbitration tribunals or the equivalent under the Railway Labor Act and the Labor Management Relations Act, nongovernmental neutrals are appointed in the more contentious grievance cases and in national emergency disputes. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* § 4.28–§ 4.37 (Kenneth May ed., 7th ed. 2012).

indication, this country has an abundance of able, responsible individuals who are eager for such assignments. Arbitrators should still find themselves playing a very worthy and rewarding role.